United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1192

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-1192, 77-1193 and 77-1219

B P/S

UNITED STATES OF AMERICA,

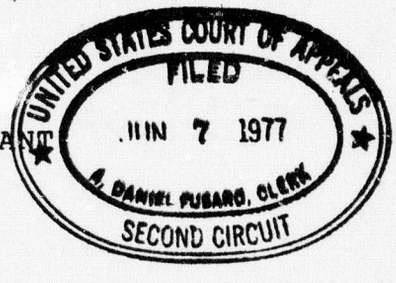
Plaintiff-Appellee,

against

JOSE ROSA, JOSE VEGA and RAFAEL RODRIQUEZ,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York



BRIEF OF DEFENDANT-APPELLANT
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Dated: June 7, 1977

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BRIEF OF DEFENDANT-APPELLANT JOSE ROSA

Preliminary Statement

This is an appeal from three judgments of conviction entered in the United States District Court for the Southern

District of New York on March 3 and April 21, 1977,* based upon findings by the Honorable William C. Conner, United States District Judge, sitting without a jury, on January 13, 1977, that all three appellants had, on March 31, 1976, unlawfully, wilfully and knowingly possessed with intent to distribute a Schedule I narcotic drug controlled substance in violation of 21 U.S.C. §§812, 841(a)(1) and 841( )(1)(a).

Prior to the trial, on September 30, 1976, a hearing was held on appellants' motion to suppress certain evidence taken from the apartment of Rosa and from the persons of Rodriquez and Vega at the time of their arrest on March 31, 1976. On November 10, 1976, Judge Conner issued a Memorandum Opinion and Order denying appellants' motions to suppress as well as their motion to compel production of the Government's informant.**

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* Judgments of conviction were entered with regard to Rosa and Rodriquez on March 3, 1977. The judgment of conviction against Vega was entered April 21, 1977. Appellants were tried by Judge Conner, sitting without a jury, on January 13, 1977 on the basis of the record made at the hearing on appellants' suppression motions held September 30, 1976, with the addition of certain stipulated facts.

** A copy of Judge Conner's Memorandum Opinion and Order is set forth in the Appendix herein at A.15 through 30. (References in the form "A", followed by a page reference, are to the Appendix herein. References in the form "Tr.",

[Footnote continued]

Also prior to the trial herein, on December 17, 1976, Rosa moved to dismiss the indictment on the ground that there existed, on March 31, 1976, no valid Schedule of narcotic drug controlled substances listing the narcotic drug allegedly possessed by Rosa in violation of law. This motion, too, was denied by Judge Conner, without opinion.

On March 3, 1977, Rosa was sentenced by Judge Conner to a three year term of imprisonment. He is currently released bail pending the outcome of this appeal.

Issues Presented for Review

1. Whether the Government agents' failure to obtain a warrant prior to entering the defendant Rosa's apartment was excusable under the doctrine of exigent circumstances.

2. Whether, in the circumstances of this case, the identification and testimony of the undisclosed informant were necessary to establish probable cause for the arrest.

3. Whether there existed, at the time of the offense charged in the indictment in this case, a valid and effective schedule of narcotic drug controlled substances listing the

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[Footnote continued from previous page]

followed by a page reference, are to the transcript of the suppression hearing, three legible copies of which have been filed with the Clerk pursuant to Section 30(2) of the Rules of this Court.) Judge Conner's Opinion is not yet reported.

narcotic drug allegedly possessed by the defendants in violation of law.

Statement of the Case

In the early morning hours of March 31, 1976 -- according to the testimony of one of eight agents of the Federal Drug Enforcement Agency ("DEA") who participated in defendant's arrest* -- an unidentified informant working for the DEA was told by the defendant Rosa at the Rios Pedro Social Club on East 105th Street in New York City that he (Rosa) had received one-eighth of a kilogram of heroin from Rosa's source of supply, a person not identified to him by Rosa. (Tr. 29.) The informant was also said by Agent Garcia to have told him that Rosa had said that he (Rosa) was "going to bring the drugs to his apartment and prepackage it and have it ready for his morning runners to have on the street before midday," a

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* The informant was not called by the Government to testify and the request by defendants for his production or identification was refused by the Court. (A.23-A.24). Only Agent Emilio Garcia testified as to what the informant told the Federal agents prior to the arrest although the informant was said to have talked to four agents prior to the time the arrest occurred. The agent to whom the informant first related his story, Richard Fiano, was not called by the Government. Two other agents, present when the informant told his story and who testified for the Government at the suppression hearing, Robert Joura and Michael Levine, were not examined by the Government concerning the informant's story.

time later specified as being 11:00 a.m. (Tr. 29; A.44.)*

Sometime prior to 7:45 a.m. the same morning, according to a Report of Investigation prepared by the DEA, the informant contacted the DEA and requested that Agents Fiano or Garcia contact him. (A.44.) At 7:45 a.m. the DEA Regional Communication Center reached Agent Fiano with the message and at 8:00 a.m. Fiano reached the informant who is

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* An entirely different account of what the informant had told the agents prior to the arrest was contained in Agent Garcia's sworn affidavit presented to the United States Magistrate at the time of Rosa's arraignment. (A.47.) According to that affidavit, the agent's basis for making the arrest was that the informant had told an unspecified "brother agent" of Garcia that the informant "had been present when two individuals named Jose had purchased one-eighth of a kilogram of heroin on March 30, [sic] 1976 at 244 East 106th Street, top floor [later established to be Rosa's apartment]. The two individuals told the informant that they would sell this heroin in the early hours of March 31, 1976." (Ibid.) During his examination Agent Garcia attempted to explain this different account given the United States Magistrate by saying that it referred to an entirely different transaction occurring the day previous to the informant's initial contact with the DEA. Despite Garcia's statement in his affidavit that this second, prior transaction had formed the basis on which the arrest was made, Garcia testified at the suppression hearing that he (and not a brother agent) had learned of this second transaction only after the arrest. (Tr. 170.) According to Garcia, both the one-eighth kilogram purchased on the 30th and the one-eighth purchased on the 31st were, according to the informant, to be distributed "in the early hours of March 31, 1976" by which he (Garcia) meant 11:00 a.m. -- one hour before midday. (Tr. 173.)

said, according to the DEA's Report of Investigation, to have told Fiano what the informant had heard Rosa say in the Rios Pedro Social Club earlier that same morning. (A.44.)

Nothing happened thereafter for an hour and a half. No steps were taken at this or any later time by Agent Fiano or by any other DEA agent to obtain a search warrant for Rosa's apartment, despite the fact that such warrants can, in the experience of one agent, be obtained in as little as one hour and a half. (Tr. 126.)* The same agent, Robert Joura, testified that there is no "regularized or formalized or informalized procedure wherein a warrant can be obtained on an expedited basis in the Southern District of New York." (Tr. 123.)

Despite the agents' later testimony that they were concerned about the 11:00 a.m. deadline because at that time the drugs were scheduled for distribution, nothing was done between 8:00 a.m. when the informant told his story to Fiano

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* Agent Robert Joura, an Assistant Group Supervisor with the DEA, of some seven years' experience (Tr. 84), testified as follows (Tr. 126):

> "Q. What is the quickest amount of time you ever were able to get a search warrant in the Southern District?
>
> "A. From the time I left my office until the time the Magistrate signed the warrant, I would say it would not be less than an hour and a half."

and 9:30 a.m. when the informant met again with Agent Fiano and with other DEA agents including Agents Emilio Garcia, Robert Joura and Michael Levine. (Tr. 26, 85, 129.)

There followed a time period variously estimated by the agents as lasting between three-quarters of an hour and one hour and a quarter, during which the agents and the informant remained at the DEA offices.* During this period of time the agents developed a "plan of operations" which involved placing the informant inside the apartment with an electronic signalling device. (Tr. 31, 129.)** Demonstrating their own

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* Agent Garcia testified that the agents left the DEA offices in time to arrive at Rosa's apartment building at 10:15 a.m., three-quarters of an hour after the 9:30 a.m. meeting with the informant. (Tr. 33.) Confronted with the DEA Report of Investigation which states that the agents left at 10:40 a.m. and with his own estimate that it took 35 minutes for the agents to get to 106th Street from the DEA offices, Garcia changed his testimony to say that the agents arrived at 106th Street at 10:30 a.m. (Tr. 174.)

Agent Joura testified that the agents arrived at 106th Street at between 11:15 a.m. and 11:20 a.m. (Tr. 85-87.) This testimony was consistent with the 10:40 a.m. departure time set forth in the Report of Investigation. It seriously undercut, however, the agents' testimony with respect to their purported concern for haste in order to arrive at 106th Street prior to the time when the narcotics were, according to the informant's account, to be distributed on the street.

** An alternate system for the informant's alerting the agents by a hand signal from the apartment's windows, which was the method eventually employed, was also planned. (Tr. 130.)

lack of confidence in the informant's reliability as well as their primary objective of obtaining evidence, the agents instructed the informant to signal them with the electronic signalling device or by alternate means when "he had [once again] seen the drugs." (Tr. 32.)*

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* According to one version of what the informant had told the agents, the informant had already "seen the drugs" at the Rios Pedro Social Club early the same morning, although he had not witnessed the transaction in which the drugs were delivered. (Tr. 157.) Taking the agents at their word, that they already had, based on the informant's story, probable cause to make an arrest, and that their primary concern was to prevent the "destruction" of the drugs by distribution to street runners, the only purpose to be served by having the informant inside the apartment would have been the prudential one of determining that Rosa was there. This, in fact, was determined by having the informant call the apartment and speak with Rosa before the informant went up to the apartment. (Tr. 32.) In all events, the appropriate course to follow would have been the immediate arrest of Rosa, based on the informant's story. This course of conduct would obviously have prevented any "destruction" of the drugs by distribution to street runners, since the entire operation would have been stopped in its tracks by the arrest. The agents could then, acting entirely at their leisure, have obtained the required search warrant for the apartment in order to seize the contraband, maintaining the limited surveillance of the apartment and its occupants as would be necessary in the interim to prevent its destruction. Instead, as noted below, the agents waited over an hour after arriving at the apartment before they entered it and failed to obtain a search warrant either before or after the arrest.

  As an alternative course of action the agents could, of course, have initiated steps as early as 8:00 a.m. to obtain a search warrant and told the informant to signal them if he was concerned that the drugs or the defendants were about to leave the apartment with a runner or otherwise. The agents offered no explanation as to why these alternatives were not pursued.

Thereafter, having marshalled seven or eight agents (Tr. 145) -- one of whom, if no other agent was available, could have been dispatched to obtain a search warrant -- and having requisitioned three cars (Tr. 99), radio communications (Tr. 99, 101) and clerical garb for disguise (Tr. 34, 85, 97, 100, 130), the agents set out for 106th Street. On the way they stopped in order for the informant to call the apartment to say he was coming up. (Tr. 32.) The informant was told by Rosa to come up, but quietly because "people were sleeping in the apartment." (Ibid.)

The agents' doubts concerning the reliability of their informant undoubtedly increased as they waited for a period variously set at between one and one-half hours (Garcia, Tr. 33), 45 to 50 minutes (Joura, Tr. 86) and one hour (Levine, Tr. 131) for the informant's signal.* No "runner" was seen

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* The informant's reliability was shaky even viewed objectively without regard for the agents on-the-spot evaluation of him as evidenced by the way they used him. The informant was, at the time, facing sentencing on another drug charge. (Tr. 71.) Moreover, in no case in which the informant was said to have given information concerning criminal activity, had the criminal activity itself actually been confirmed by the government prior to March 31, 1976. On cross-examination, Agent Garcia stated he believed one purchase of narcotics might have been made by the informant acting for the DEA under DEA surveillance prior to March 31. (Tr. 75-76.) However, the agents' records to confirm this not very precise recollection were not produced, despite the Court's suggestion that the agent use the lunchbreak to obtain them. (Tr. 77.)

entering or leaving the apartment and the 11:00 a.m. deadline had long expired by the time the informant's signal came.

Following the informant's signal through the front window of the apartment to the agents to the effect that he had seen the drugs, the agents entered the building, climbed the steps to Rosa's apartment and proceeded without pause into the apartment through a door said variously to have been open five or six inches (Garcia, Tr. 35), at a forty-five degree angle or half-way open (Joura, Tr. 105) and eight to ten inches (Levine, Tr. 133). One of the agents, Levine, testified that he saw through this opening, before entering the apartment, a small quantity of tin foil and clear plastic glassine material on a table against the wall next to a door.* He further stated that he was "in front" entering the door (Tr. 132), thus offering an explanation why the other agents did not observe the tin foil and glassine. However, Agent Joura who accompanied him testified they entered "shoulder to shoulder." (Tr. 113.)** In all events, none of the agents stopped or paused,

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* Agent Joura testified that an individual was standing in the doorway working on the door when the agents entered. (Tr. 106.) Agent Levine recalled no such obstruction of his view. (Tr. 135.)

** It may be doubted whether the Government met its burden of proof with regard to what Judge Conner chose to view as the sole item of independent corroboration of the informant's reliability on the issue of whether narcotics were in the apartment. Only one agent says he made the

[Footnote continued on next page]

but entered the apartment "almost as soon as we reached the top of the stairs." (Tr. 108.)

The agents entered the apartment with the guns drawn (Tr. 36, 96), two in the dress of priests (Tr. 34, 85, 97, 100, 130), none of the others in uniform. (Tr. 100.) The occupants of the apartment were placed "up against the wall" (Tr. 39) and "frisked." (Tr. 136.) Two individuals who were not identified by the informant as being involved in the earlier narcotics receipt were let go. (Tr. 138.) A third individual, the defendant Rodriquez -- also not identified by the informant as being involved in the earlier narcotics receipt -- was arrested after a pat-down search of his person turned up a small tobacco pouch containing a small quantity of narcotics. (Tr. 41, 43-46.)

In these coercive circumstances and after the illegal frisking of Rodriquez,* but before any Miranda warnings had

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observation. Tin foil and clear plastic is not particularly incriminating. The opportunity for observation was restricted. But most importantly, this crucial piece of evidence was not even mentioned in the agents' report (A.44) was "accidentally mixed up" with other evidence following the seizure (Tr. 50) and was either inaccurately referred to or not referred to at all in the report of the evidence seized prepared by the agents. (Tr. 160, 161.)

* Of which defendant Rosa has standing to complain, if only because he is charged with possession of the narcotics seized from Rodriquez. Jones v. United States, 362 U.S. 257 (1960); United States v. Price, 447 F.2d 23 (2d Cir. 1971).

been given, defendant Rosa is alleged to have said "it's all mine." (Tr. 46, 137, 144.) A warning was then given (which failed to advise defendant Rosa of his rights not to consent to a search) following which Rosa is alleged to have said that he would show the agents where other narcotics were if they would not "break up the place." (Tr. 48, 52, 54.) "Just don't tear the house up and I will show you what I got." (Tr. 138.) Even given this statement by the defendant indicating that he was acting under coercion, the agents gave him no warning concerning his rights to a warrant but simply took him up on his coerced offer and searched the premises.

What was actually seized in the apartment was not two one-eighths of a kilogram of heroin, as predicted by the informant, but 46.17 grams or less than one-twentieth of a kilogram. (A.49-64.)

POINT I

THE AGENTS' FAILURE TO OBTAIN A SEARCH WARRANT WAS NOT EXCUSED BY EXIGENT CIRCUMSTANCES OR OTHERWISE

The District Court concluded that the agents reasonably believed "that the delay in obtaining a warrant would in all likelihood have prevented [the agents] from 'arresting' not defendants alone, but rather the 'destruction of the evidence' as well" (A-26) and that, therefore, the agents' warrantless search was "among those 'jealously and carefully drawn' situations, Jones v. United States, 357 U.S. 493, 499 (1958), that validate warrantless searches." (A-25, A-26.)

The lower Court's conclusion that the warrantless search of Rosa's apartment was excused by the exigent need to arrest him and thus to prevent him from distributing the drugs on the street, will not withstand scrutiny. On the testimony of two of the three agents who testified for the Government, simply ignored by the District Court, the warrant could have been obtained well before the arrests were actually effected and before they expected the distribution of drugs would to be effected. Further, the agents' delay in acting on the information that the defendant Rosa was in the apartment belies any claim that they considered it exigent to arrest Rosa at once to prevent the "destruction" through distribution by him of the drugs. Finally, Rosa's apartment was entered and Rosa and the

other defendants arrested without a warrant, no exigent circumstances or other excuse existed justifying the further search of Rosa's apartment without a warrant.

It bears saying preliminarily that the circumstances of this case illustrate well the purpose of the requirement that a warrant be obtained from a disinterested Magistrate prior to the search in all but the most exceptional circumstances. As the Supreme Court stated in Johnson v. United States, 333 U.S. 10, 13-14 (1948):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.... When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." (Emphasis supplied.)

The practical need for neutrality and detachment is amply demonstrated by the case at bar. Clearly, the calm ex parte inquiry by a United States Magistrate prior to the event is better calculated to elicit the true story from the agents involved than is a tense, after the fact adversary confrontation in which the agents cannot help but be influenced by a

desire to justify and rationalize deeds which they have already done. It is also better calculated to develop a plan of operations mindful of the interests of the uninvolved bystanders, including children, in the defendant's apartment at the time of the arrest and of the constitutional rights of the defendants in such a situation.

Quite plainly, in the circumstances of this case -- in which the arresting agent gave one sworn account of the basis for his arrest in an affidavit on the arraignment and a completely different one in his testimony at the hearing; in which the agent's memory as to whether the informant's reliability had been confirmed by a narcotics transaction before or after the event varied on cross-examination from what it had been on direct examination; in which the one piece of independent corroboration of the informant's statement that there were narcotics in the apartment is said to have been witnessed by only one of the eight arresting agents, through a door said to have been open either five inches or at a 45° angle, obstructed or not by a man's body; and in which the physical evidence to support the corroborating story is said to have been accidentally mixed up with other evidence and was never reported in the agents' reports -- it would have been preferable for a detached Magistrate to explore the matters justifying the agent's actions and the plan of operations to be

followed before memories lapsed, before the agents involved had departed for other locations and before the agents had developed the kind of interest in the outcome which arises once they have actually entered another person's private dwelling without a warrant.

Be that as it may, no exigent circumstances existed at 8:00 A.M. on the morning of March 31, 1976, justifying the agents' failure to commence applying for a warrant at that time. Joura testified that a warrant could be obtained in the Southern District of New York in as little as an hour and a half. (Tr. 126) A second agent put the minimum time at twice that time, but still within three hours. (Tr. 31) The District Court ignored these statements and instead accepted the "four to five hour" estimate of the third agent who testified (A-26).* Within any one of these three estimates the warrant could have been obtained by the time the arrests were actually effected. By failing to act promptly to obtain a warrant the agents created whatever "exigencies" were in existence at the time they actually moved into the apartment and such self-created exigencies are not within the exception to the requirement of a

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* A warrant may be more difficult to obtain late at night or early in the morning before the start of normal working hours. Dorman v. United States, 435 F.2d 385, 395 (D.C. Cir. 1970). In the present case, however, the agents faced no such obstacles. Agent Fiano received the informant's tip on a Wednesday morning as the workday commenced.

search warrant. United States v. Rodriguez, 537 F.2d 834 (2d Cir. 1976); United States v. Scheffer, 463 F.2d 567 (5th Cir. 1972); United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974); United States v. Wilcox, 357 F. Supp. 514 (E.D. Pa. 1973).

In Wilcox, supra, F.B.I. agents had advance knowledge that the proceeds of a bank robbery were located in the defendant's apartment. Although warrants were obtainable in the jurisdiction within 1-1/2 to 2 hours, the agents waited 1-1/2 hours (all the while possessing probable cause to support a warrant) and then, claiming an excusing exigency, conducted a warrantless entry and search of the defendant's apartment. The court noted that the agents were faced with the exigency (the disposal of the proceeds) only because of their own inexcusable failure to seek a warrant. Since the agents had time and probable cause to obtain a warrant, their warrantless search violated the defendant's Fourth Amendment rights.

In all events no "exigencies" had arisen at the moment when the agents moved into the apartment. The agents had known since 8:00 A.M. and had confirmed when the informant placed a call to the apartment prior to entering it, that the defendant Rosa was in the apartment. If it were exigent to arrest Rosa to prevent the distribution of the drugs, then the agents would have moved in long before they did. Clearly they did not because they entirely controlled the situation and could, unless and until the situation changed (which the

informant was in a position to inform them of), control the time when the arrest occurred. Under these circumstances no exigency existed.

In United States v. Scheffer, supra, customs agents arranged to have cooperating drug smugglers transact a cocaine sale in the defendant's home. The agents observed the smugglers enter the home, waited a few minutes and then entered the home without a search warrant. The court dismissed as "incredible" the claim that the agents had insufficent time a seek a warrant. Since the agents planned the entire transaction and controlled the time at which it occurred, the agents were under not time constraints in obtaining a warrant and thus had no justification to by-pass the warrant requirement. So, too, in this case, the agents could easily have waited until a warrant arrived or until actual exigencies arose. It is not the mere possibility of destruction of evidence but the actual need to seize evidence "in the process of destruction" that the Supreme Court had recognized as permitting a warrantless search. Vale v. Louisiana, 399 U.S. 30, 35 (1970)*; cf. United States v.

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* "Officers may rationally perceive possibilities of destruction.... Thus, a threatened-destruction exception might well reduce in practice simply to the requirement that policy officers believe they have probable cause to search. The risk of searches without probable cause would then be about the same as if they were no warrant requirement." Note, Police Practices And The Threatened Destruction of Tangible Evidence, 84 Harv. L. Rev. 1465, 1373 (1971).

Rubin, 474 F.2d 262 (3rd Cir. 1973) and United States v. Curran, 498 F.2d 30 (9th Cir. 1974) with United States v. Brewer, 343 F. Supp. 468 (D. Haw. 1972).

No exigencies existed at the time the agents moved in because either before or after the arrest of Rosa it was open to the agents, who maintained complete control over the situation, to maintain the surveillance necessary to assure that no destruction of evidence occurred. Before the arrest the informant was in a position to advise the agents if a distribution of the narcotics commenced. After the arrest the agents could have occupied the premises to the extent necessary to prevent destruction while waiting for the warrant to arrive. In United States v. Rosselli, supra, Mr. Justice Stevens, then on the Seventh Circuit, expressed the pertinent standard for assessing the police behavior in similar circumstances:

> "[T]he evidence [must] adequately explain why no attempt to obtain a warrant was made, or why no consideration was given to placing the defendant's apartment under surveillance while an attempt to secure a warrant was being made." 506 F.2d at 630.

As Mr. Justice Stevens indicated, officers who can control events at the scene of an investigation can also provide themselves with the time and opportunity to seek a warrant. The officers at the scene can maintain surveillance (and can respond to any exigency) while one officer applies for a warrant.

Judge Friendly of this Circuit has expressed the same point in a case involving a warrantless search after the arrest in a house of illegal aliens:

> "[The agents] were required to do as best they could to maintain custody of the aliens lawfully arrested and surveillance of the house while a search warrant was being obtained." United States v. Rodriguez, 532 F.2d 834, 839 (2d Cir. 1976).

In the instant case the DEA agents had both the time and the control of the investigation necessary to require them to stay their hand either (1) until actual exigent circumstances arose or (2) until a search warrant arrived. Their failure to wait until actual exigent circumstances arose or to even initiate steps to obtain a warrant required that the evidence secured from their entry be suppressed.

Nor can the agents, at this late date, take the position that they did not apply for a warrant for the search of Rosa's apartment after his arrest, while maintaining the surveillance necessary to prevent destruction of the narcotics, because Rosa consented to a search of his apartment. Plainly, Rosa's offer to show the agents what he had in the apartment was not in the "totality of the circumstances" his own "essentially free and unconstrained choice." Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Watson, 423 U.S. 411 (1976). Not only were the actions of the agents in this case similar to those of the police in United States v.

Mapp, 476 F.2d 67 (2d Cir. 1973), but the offer of Rosa to permit the search on its face indicated that he understood "that the officers intended to search the apartment whether they had permission to do so or not." 476 F.2d at 78. As the agents themselves testified, Rosa's offer was to show the agents where the narcotics were if they would not "break up the place" (Tr. 48, 52, 54). "Just don't tear the house up and I will show you what I got." (Tr. 138.)

Under those circumstances the agents were, of course, duty-bound to advise Rosa that he did not have to, as he obviously believed he had to, consent to a search; that he could require that an independent judicial officer determine the agent's rights to search and limit the search's scope.* Instead the agents took advantage of Rosa's misunderstanding of his rights and let him lead them to the contraband. Thus even if the entry to arrest Rosa had been justified by exigent circumstances, which it quite clearly was not, the search of his apartment which followed the arrest was improper and the evidence secured by that search should have been suppressed. Under any analysis the lower Court's decision was in error.

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* Of course, as Judge Mulligan has noted, the agents could have advised Rosa that the warrant would in all likelihood be granted and that they would maintain surveillance in the interim to assure the narcotics didn't disappear. Such advice is not itself coercive. United States v. Faruolo, 506 F.2d 490 (2d Cir. 1974).

POINT II

IN THE CIRCUMSTANCES OF THIS CASE TESTIMONY OR AT A MINIMUM IDENTIFICATION AND PRODUCTION OF THE ANONYMOUS INFORMANT WAS NECESSARY TO ESTABLISH THE AGENTS' PROBABLE CAUSE FOR MAKING THE ARREST

In the circumstances of this case, it was a triumph of form over substance for the Government to refuse to present the testimony of the anonymous informant or to at least produce him for examination by defendants. Not only was the secrecy concerning the informant's identity effectively compromised by the manner in which the agents effected the arrest and by their testimony at trial, but the need for the informant's testimony was made pressingly clear during the hearing (1) by the serious inconsistencies which developed at the hearing concerning what the informant told the agents prior to the arrest; (2) by the serious deficiencies in the Government's proof concerning the one item of independent corroboration of the informant's story testified to during the hearing; and (3) by the paucity of evidence established by the Government at the hearing concerning the informant's prior reliability.

What was excessively formal in the Government's insistence on preserving the informant's anonymity in this case was the fact that his identity was made patently clear by the agents' testimony at the suppression hearing. As the agents testified, the informant was the man in the apartment who

signalled to the agents from the front window. (Tr. 130-131.) By simple process of elimination, it was clear to all involved -- including Judge Conner (Tr. 138) -- that the informant was the only male not arrested who was present in the kitchen at the time of entry, as Agent Garcia explicitly confirmed. (Tr. 39.) Under these circumstances, it was the height of formality for the Government to persist in its insistence that the informant's presence in the courtroom was prohibited because the informant himself (without corroboration) had told one of the agents that "the people we arrested were connected with some (sic) organized syndicate in the East Harlem area and if he was required to testify his life would be jeopardized." (Tr. 62.) No other support was offered by the Government for declining to produce the informant.

What required the informant's testimony was, first, a serious conflict in the sworn testimony of the only agent called to testify on the subject concerning what the informant had told the agents prior to the arrest. The sworn affidavit of Agent Garcia presented to the U.S. Magistrate at the arraignment when memories were fresh set forth the basis for the arrest as information concerning a purchase of narcotics occurring on March 30, 1976, in the informant's presence in the apartment in which the arrest was made. (A.47) At the suppression hearing the same agent testified that the basis

for the arrest had been the informant's story concerning what he had heard the defendant Rosa say concerning his receipt of a different batch of heroin on March 31, 1976 at the Rios Pedros Social Club. (Tr. 26, 29.) The agent's explanation of the inconsistency -- that he had reported to the Magistrate the earlier transaction which he had learned of only after the arrest -- was hardly satisfactory since it failed to explain why the informant did not report both transactions of the agents during the substantial period of time he was with them prior to the arrest and why the two separate transactions were nowhere referred to in the agents' Report of Investigation. (A.44-46.) Clearly the informant could have testified to the point on these matters. Given the fact that Agent Fiano was not called and Agents Joura and Fiano not questioned concerning the informant's story by the Government -- with the Government taking the tack that defendants would make the witnesses their own if they examined them on the subject -- the Government's failure to call the informant was inexcusable.

A further deficiency in the Government's proof, concerning which the informant's testimony was needed, related to the sole item of evidence obtained by the agents tending (perhaps) to corroborate the informant's story prior to the arrest -- namely the tinfoil and glassine fortuitously seen by

one agent through the open door of the apartment as he rushed into the room. The District Court placed heavy reliance on this evidence in excusing the informant's presence (A.23) but failed to recognize that the informant's presence was, under the circumstances, vital to establish the existence and opportunity for observation of this evidence prior to the arrest.

The only independent corroboration of the informant's statements that there were narcotics in the apartment was the alleged glimpse by one of the eight arresting agents, not of narcotics, but of a small quantity of tinfoil and clear plastic material on a table near the door as the agent entered the apartment.* The material was said to have been seen by an agent on the move, through a door opening variously estimated at between five inches and 45°. (The agent who is said to have had the glimpse testified the door was open eight to ten inches.) The door opening was said to have been obstructed by part of a man's body. (The agent who is said to have had the glimpse recalled no such obstruction.) The observation was not recorded in the agents' reports prepared immediately after the entry. The material said to have been observed on the table

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* Whether the glimpse of this matter, if it occurred, would have influenced the agents' conduct in any way is to be doubted, since the agents clearly intended to enter the apartment whether they obtained independent corroboration or not.

was reported in the agents' reports of evidence seized as having been seized in a cardboard box located elsewhere in the apartment. The explanation for the misstatement in the reports was that the evidence was "accidentally" mixed up with other evidence after the arrest, but the mix-up was not referred to in the agents' reports. To award this testimony, contradicted by the agents' written reports, the status of independent corroboration of the informant's reliability excusing his production would be to invite the fabrication of evidence by narcotics agents in later equally close cases. In all events it should not excuse the informant's appearance where the informant himself could, from his location on the other side of the door, assist in establishing whether the corroboration existed.

Finally, it bears noting that the rule of United States v. Commissiong, 429 F.2d 834, 838-839 (2d Cir. 1970) relied on by the District Court in excusing the informant's presence on the theory that the informant's story did not in this case constitute "the essence or core or main bulk" of the evidence establishing probable cause should not apply here (1) because the glimpse of the tinfoil and glassine by one agent in the process of entering a door which he was clearly going to enter anyway did not convert those items into "the essence or core or main bulk" of the reason for entry and (2) because

there were in this case, unlike Commissiong, independent grounds for questioning the informant's prior reliability. As the arresting agent testified on cross-examination, he believed that in only one case had the informant's information concerning a specific criminal offense been corroborated prior to March 31, 1976, and his records to support that belief were not produced despite the Court's invitation that the agents use the lunchbreak in the hearing to secure them. (Tr.76)

POINT III

AT THE TIME OF THE OFFENSE CHARGED IN THE INDICTMENT THERE EXISTED NO VALIDLY PROMULGATED SCHEDULE OF NARCOTIC DRUGS

Section 812 of Title 21, United States Code, pursuant to which Defendant Rosa was indicted, provides in pertinent part that:

> "There are established five schedules of controlled substances, to be known as schedules I, II, III, IV and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semi-annual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter." (Emphasis supplied).*

Section 812 was originally enacted as part of Public Law 91-513 on October 27, 1970, 84 Stat. 1247. Under the provisions of Section 812, the schedules "initially" consisting of the substances listed in that section were required to be "updated and republished on a semi-annual basis during the two-year period beginning" October 27, 1971 and ending October

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* Responsibility for the administration of Section 812, including the requirement of updating and republication, is placed on the Attorney General of the United States or his delegate by Section 811 of Title 21:

> "The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by Section 812 of this title and to any other drug or any substance added to such schedules under this subchapter."

27, 1973. Thereafter, in the one year period commencing October 27, 1973 and ending October 27 [illegible], Section 812 required that the schedules again "be [illegible]d and republished." This was done by the Attorney General through his delegate, the Chief of the DEA, on June 20, 1974. 39 F.R. 22141. (A. 45-46.)

In the one year period commencing October 27, 1974 and ending October 27, 1975, Section 812 again required that the schedules "be updated and republished." However, although on May 7, 1975 and July 8, 1975 additional substances were added to Schedule I, 40 F.R. 19813, 28611, the schedules were neither updated or republished by the Attorney General or his delegate, as required by law. (A. 45-46.)

In the one year period commencing October 27, 1975 and ending October 27, 1976 -- the one year period encompassing the time of the offenses charged in the indictment -- Section 812 again required that the schedules established pursuant to Section 812 be updated and republished. Again, although on January 28, 1976 a further substance was added to Schedule I, 41 F.R. 4016, the schedules were neither updated nor republished by the Attorney General or his delegate, as required by Section 812. (A. 45-46.)

Three Courts of Appeal have addressed the issue whether the failure to update and republish the Schedules of

narcotic drugs pursuant to the requirements of Federal law means that the schedules lapsed, barring prosecution. United States v. Mundt, 508 F.2d 904 (10th Cir. 1974) cert. denied, 421 U.S. 949 (1975); United States v. Nocar, 497 F.2d 719 (7th Cir. 1974) cert. denied, 419 U.S. 1083 (1974); United States v. Infelicice, 506 F.2d 1358 (7th Cir. 1974) cert. denied 419 U.S. 1107 (1974); United States v. Grummel, 542 F.2d 789 (9th Cir. 1976). Each Court has been able to dispose of the issue by a factual finding that at the time of the offense charged in each case the Government's obligation to update and republish the Schedules had not matured.

Two District Court Judges have been obliged to confront the issue more squarely upon a factual finding that the Government's obligation to republish had matured at the time of the offense charged. United States v. Monroe, 408 F.Supp. 270 (N.D. Cal. 1976); United States v. Andrews, 408 F.Supp. 1007 (N.D. Cal. 1976). These two cases have resolved the issue on a factual finding or assumption that all that was at issue was a failure to republish and that, under familiar legal principles, an absence of publication of a statute or regulation does not invalidate it, if it can be shown that the

defendant had knowledge of the contents of the document which the Government failed to publish.* See, United States v. Aarons, 310 F.2d 341 (2d Cir. 1962).

This case presents an issue not previously decided by these cases; namely whether the Government's failure to update the schedule and the absence of the underlying document -- the updated schedule -- wholly apart from any failure to publish it invalidates the Statute and regulations requiring that the schedules be annually updated. It is defendant Rosa's submission that where the Government has not simply failed

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* Section 7 of the Federal Register Act, 44 U.S.C. §1507, provides that:

> "A document required by Section 1505(a) of this Title to be published in the Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals of certified copies [have been] made available for public inspection, as provided by Section 1503 of this Title...."

Section 552 of Title 5 of the Administrative Procedure Act provides in relevant part:

> "(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --
>
> "...(D) Substantive rules of general applicability adopted as authorized by law...;
>
> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."

to publish the text of the updated schedule but has failed even to write it down for its own internal use or for production in response to request by interested parties and has failed to perform its annual duty of updating the schedule, the outdated schedule cannot be used as the basis for a criminal prosecution. In such circumstances a defendant's knowledge of what might, or would probably, or in all likelihood be contained in the updated schedule if it were promulgated, cannot excuse the Government's failure to perform the ministerial act of writing out the document so that the law exists in physical form somewhere in the Government's files or the more substantive act of bringing the schedule up to date.

The Drug Control Act of 1970, P.L. 91-513, now codified as 21 U.S.C. §§801 et seq., represented an effort inter alia to provide a mechanism for continuing a re-evaluation of the types of narcotic drugs the possession, sale and use of which are to be subject to Federal criminal sanctions and Federal regulation. House Report (Interstate and Foreign Commerce Committee) No. 91-1444, Sept. 10, 1970; Senate Report (Judiciary Committee) No. 91-613, Dec. 16, 1969, 3 U.S. Code Congressional and Admin. News, 91st Cong. 2d Sess. (1970) at p. 4589.

As the House Report on the bill which eventually became law states:

> "Part B of the bill (sections 201 and 202 [21 U.S.C. §§811 and 812]) lists the drugs initially subject to control under the legislation, and establishes a procedure for future determinations as to drugs to be subject to the controls of the bill." (Emphasis supplied.) 3 U.S. Code, Congressional and Admin. News, 91st Cong. 2d Sess. (1970) at p. 4589.

Under Section 201 of the Act, 21 U.S.C. §811, the Attorney General may, in the words of the House Report (Ibid at p. 4599),

> "by rule add a substance to a schedule or transfer a substance between schedules. This subsection further permits the Attorney General to remove a substance entirely from the schedules by rule if he finds that the substance no longer meets the requirements for inclusion in any of the schedules."

Among the factors to be taken into account by the Attorney General in adding to or deleting substances from the schedules are "the state of current scientific knowledge regarding the substance" "its history and current pattern of abuse" (emphasis supplied) and such other factors subject to change from time to time as "the social significance and impact of such a decision upon those people, especially the young, that would be affected by it." (Ibid at pp. 4602-4603.)

Section 202(a) of the Act, 21 U.S.C. §812(a), described by the House Report (Ibid at 4604):

> "...establishes five schedules and provides that these schedules shall initially [emphasis in original] consist of the substances listed in section 202. The subsection further provides for a semi-annual updating and republishing of the schedules during the 2-year period beginning 1 year after the

date of enactment of Title II of the act. After the expiration of this 2-year period, the schedules are to be updated and republished on an annual basis."

The criteria for each schedule, as described in the House Report, again include continued references to such factors subject to change over time as "currently accepted medical use in treatment in the United States," and the fact that "Methadone, listed in Schedule II, for example, is used today in a number of programs for the treatment of narcotics programs and the adoption of this bill will not, of itself, lead to any change in the extent to which such use is permitted today." (Emphasis supplied.)

Thus, it is quite clear from the regulatory scheme of the Act and its legislative history, that the requirement that the schedules be up to date was intended by Congress to task the Department with a substantive function of re-evaluating and modernizing the schedules periodically to keep up with changing social conditions and scientific knowledge. The Department has failed to perform this function.* Accordingly, it is left

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* The Department has, moreover, been given fair warning of its dereliction. In United States v. Monroe, 408 F. Supp. 270, 275 N. 10 (N.D. Cal. 1976) Judge Peckham explicitly stated:

"Nevertheless, we urge the government to carry out its obligation under this and other Congressional

[Footnote continued]

with out of date schedules on which it cannot expect to maintain a prosecution. Hotch v. United States, 212 F.2d 280 (9th Cir. 1954).*

What was said by Chief Justice Stone in Viereck v. United States, 318 U.S. 236, 245 (1943) is applicable in this case:

> "...men are not subjected to criminal punishment because their conduct offends our...emotions or thwarts a general purpose to be effected in specific commands which they have not disobeyed. Nor are they to be held guilty of offenses which the statutes have omitted, though by inadvertence, to define and condemn. For the courts are without authority to repress evil save as the law has proscribed it and then only according to the law."

[Footnote continued from previous page]

> mandates far more carefully than it has done here... [T]his court does not mean to place its imprimatur upon the government's conduct in this matter."

Despite this statement the Attorney General has failed to perform the function of annual updating and republication mandated by the statute.

* So much of Hotch as concluded that publication is a prerequisite to the promulgation of a valid regulation has been rejected in this Circuit. United States v. Aarons, 310 F.2d 341 (2d Cir. 1962). However, in both Hotch and Aarons there was no question that the regulation at issue had been validly promulgated by the agency in every respect except publication. Nothing in Aarons undercuts the basis proposition for which Hotch is cited here, that one cannot be prosecuted under a law or regulation which has not been promulgated as required by law. See, Viereck v. United States, 318 U.S. 236, 245 (1943); Kraus & Bros. v. United States, 327 U.S. 614, 621 (1946); Diamond Roofing Inc. v. OSHRC, 528 F.2d 645 (5th Cir. 1976).

CONCLUSION

For the reasons set forth herein it is respectfully requested that defendant's conviction be reversed.

Respectfully submitted,

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